

OK, using the word “theory” in connection with Trump may seem like a stretch. But he does seem to have an implicit theory of law, which helps explain a lot of his approach to regulatory change. He’s also an intuitive believer in a strong form of the unitary executive.

Theories of law can be classified along several different dimensions. On one dimension, we have theories about the nature of law. Here, the main distinction is between believers in natural law and legal positivism. Natural law theories believe that something is truly law only if it is consistent with reason and justice. Legal positivism say that something is law if and only if it is an edict from someone with authority. (I’m oversimplifying like mad here, but this gives the general idea.). So one theory views law as an embodiment of reason; the other as fiat. The other dimension relates to theories of judging. The divide here is between legal realists and formalists. Again oversimplifying great, legal realists see judicial decisions as driven by policy ; while formalists say they should be driven by logic and legal rules.

Taken together, these two dimensions give us the following matrix:

| | Legal positivist | Natural Law |
|------------------------|-------------------------|--------------------|
| Legal realism | 1 | 2 |
| Legal formalism | 3 | 4 |

You can find legal theorists in pretty much each of these boxes, though some are more common than others. What I’d like to suggest is that Trump is located in the upper-left corner of the matrix. That is, he thinks that law is a matter of fiat and also that judges are driven by politics. In other words, he’s instinctively an extreme legal positivist and legal realist. Law expresses the will of those in power, and judges are driven by their political views. The first characteristic is seen in the lack of interest shown by him and many of his officials in grounding decisions in legal reasoning or evidence. Not necessary if law is fiat. And the second characteristic is displayed by blaming “Obama judges” for legal impediments and calling for the appointment of “Trump judges” who will uphold his actions.

To fully understand Trump’s outlook, you also have to take into account his embrace of the unitary executive theory, against in extreme form: there is one executive branch, and it is him. Of course, all presidents more or less believe that they’re in charge of the executive branch, but perhaps few are so outraged when subordinates like Jeff Sessions fail to carry out their every wish.

Putting aside all the legal theory, the world doesn't actually work like that. Sure, judges are influenced by their political perspectives, but they're also part of a legal culture that endorses legal reasoning and adherence to precedent. And as a practical matter, there are only a few areas where the President's say-so - or that of an agency — is enough to create a binding legal result, with no need for justification. And as all Presidents discover, giving an order and actually get something done are two different things.

The collision between the Trumpian worldview and the actual operation of the legal system has already been the source of many losses in court. For instance, the courts have torpedoed numerous Administration's efforts to dispense with notice to the public and the opportunity to comment on regulatory changes. Some of Trump's more sophisticated agency heads are trying to massage his edicts into acceptable legal form. But it may not be easy to come up with reasonable support for some of Trump's desired outcomes. We'll see how that works out.